



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 17, 2016

Institute for Justice
C/o Ms. Angela Erickson
901 North Glebe Road, Suite 900
Arlington, Virginia 22203

Re: Formal Complaint 16-FC-254; Alleged Violation of the Access to Public Records Act by the Indiana Prosecuting Attorneys Council

Dear Ms. Erickson:

This advisory opinion is in response to your formal complaint alleging the Indiana Prosecuting Attorneys Council (“IPAC”) violated the Access to Public Records Act (“APRA”), Indiana Code § 5-14-3-1 et. seq. Mr. J. Thomas Parker, Chief of Staff responded. His response is attached for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 3, 2016.

BACKGROUND

Your complaint October 3, 2016, alleges the Indiana Prosecuting Attorneys Council violated the Access to Public Records Act by failing to provide you with a copies of reports filed to IPAC pursuant to Indiana Code § 34-24-1-4.5.

On or about August 17, 2016, you submitted a public records request to IPAC for the following information:

1. All annual forfeiture reports submitted to the Legislative Council in their electronic format pursuant to Ind. Code § 33-39-8-5(7); and
2. All reports from prosecuting attorneys to IPAC regarding the “amount of money or property that is the subject of the judgment; and law enforcement agency to which the money or property is ordered to be transferred” pursuant to Ind. Code § 34-34-1-4.5.

IPAC responded to your complaint and provided item 1, however, it denied item 2 as deliberative material under Indiana Code § 5-14-3-4(b)(6).

In its response, IPAC argues the material is in fact deliberative comparing the document to a prosecutor's plea agreement manual referenced in *Newman v. Bernstein*, 766 N.E. 2d 8, 10 (Ind. Ct. App. 2002) which was found to meet the exception to disclosure. It reasons that the documentation filed with IPAC "reflects a prosecutor's thought process about whether or not and to what extent to exercise their authority to have property declared forfeit."

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See Indiana Code § 5-14-3-1*. The Indiana Prosecuting Attorneys Council is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the IPAC's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

In regard to forfeiture of property used in violation of certain crimes, Indiana Code § 34-24-1-4.5 states:

After a court enters a judgment in favor of the state or a unit under section 4 of this chapter, the prosecuting attorney shall report the:

- (1) amount of money or property that is the subject of the judgment; and
- (2) law enforcement agency to which the money or property is ordered to be transferred; to the Indiana prosecuting attorneys council.

IPAC argues the release of this report from county prosecutors is deliberative because it would threaten to compromise prosecutor's decision-making process if the public were to know if forfeiture authority is more likely than not to be exercised by that individual prosecutor.

The "deliberative materials" exception under Indiana Code § 5-14-3-4(b)(6) states that:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

As IPAC notes, the purpose of this exception is to allow free and frank discussion of legal and policy matters of public employees and officials without compromising the quality of their agency's decisions. The deliberative materials exemption is indeed broad but can be over-applied. Some have called it the exception which swallows the rule. I have called for this exception to be used sparingly and judiciously.

Similar to the discretionary release of attorney work product, the deliberative materials exception protects the mental impressions of public officials, in this case prosecuting attorneys. However, this exception to disclosure must only be invoked for expressions of opinion and speculations which are communicated for decision-making purposes.

The data in question falls into neither category. Amounts of money and the transferring agencies are not opinions, speculations, ideas, subjective determinations, mental impressions, ruminations, brainstorming or the like. The information is purely factual in nature. Moreover, they are not communicated for the purpose of decision making. They are collected by IPAC after a decision to file for forfeiture is made. IPAC has not identified a decision making process after the information is collected from prosecutors. To my knowledge, the reports filed under Indiana Code § 34-34-1-4.5 do not contain narrative summaries, policy statements, legal strategies, or substantive pre-decisional discussion.

IPAC argues the release would allow an inference to be made into the strategic tendencies of a prosecutor to seek a forfeiture judgment. Both parties concede the proceedings at the trial court level are not inherently confidential. A judge's order on forfeiture is public record as are the pleadings associated with the proceeding. There is no question certain inferences about local prosecutors can be extrapolated from the aggregate data in the reports. But IPAC fails to explain how the mere *likelihood* of a prosecutor seeking a forfeiture declaration would compromise a disposition hearing on seized property; the mental impressions of that prosecutor; or the underlying decision-making process of the prosecutor or IPAC. The release of information must potentially compromise the decision-making process or the ability of a civil servant to speak freely, openly and honestly to colleagues in order for it to be considered deliberative. The information in the instant case does not compromise those considerations.

Based on the foregoing, it is the Opinion of the Public Access Counselor that reports collected by IPAC pursuant to Indiana Code § 34-34-1-4.5 should be released.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt
Public Access Counselor

Cc: Mr. J. Thomas Parker